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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 630

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, ET AL.,

Appellants,

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 630

DANIEL KING, ROBERT GOLDSMITH, ALBERT DALLAS, JOHN R. JUDGE, TOBIN ANDERSON, JULIUS HOFF, CHESTER WALK, JOHN ROONEY AND FRANK DEMPSEY, FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER PATROLMEN, SERGEANTS AND TURNKEYS OF THE METROPOLITAN POLICE FORCE OF THE CITY OF ST. LOUIS, SIMILARLY SITUATED, *Appellants,*

vs.

H. SAM PRIEST, THOMAS H. COBBS, FRANCIS L. GEORGE, BEN L. LIBERMAN AND ALOYS P. KAUFMANN, CONSTITUTING THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, *Appellees*

STATEMENT OF SUGGESTIONS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(a)

The Determination of This Cause by the Supreme Court of Missouri Did Not Involve the Sustention of the Validity of a "Statute of the State."

Appellants here are attacking the validity of a rule promulgated by the Board of Police Commissioners for

the City of St. Louis, Missouri, which reads as follows:

> "342. Other Organizations Forbidden—All members and employees of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employes other than the Police Relief Association, the Police Funeral Association and the St. Louis Police Pension Fund Association, each of which has been duly authorized to perform certain necessary functions."

The attack is bottomed upon the First and Fourteenth Amendments to the Federal Constitution, and it is claimed that jurisdiction to entertain this appeal is found in Section 237(a) of the Judicial Code of the United States, as amended, being Section 344(a) of Title 28 of the United States Code Annotated, reading as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

Appellees submit that this Court does not have jurisdiction of this appeal.

It appears from the record in this cause that the rule here under attack was promulgated by the Board of Police

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Commissioners of the City of St. Louis, Missouri, pursuant to authority delegated to that board under Section 7695, R. S. Mo. 1939. This statute reads in part as follows:

> "• • • The boards of police are hereby authorized to make all such rules and regulations, not inconsistent with this article, or other laws of the state, as they may judge necessary, for the appointment, employment, uniforming, discipline, trial and government of the police. The said boards shall also have power to require of any officer or policeman bond with sureties when they may consider it demanded by the public interests. All lawful rules and regulations of the board shall be obeyed by the police force on pain of dismissal or such lighter punishment, either by suspension, fine, reduction or forfeiture of pay, or otherwise as the boards may adjudge."

It is the contention of appellees that the rule so promulgated is not a "statute of the state" as that term is used in the Federal act conferring jurisdiction of appeals upon this Court. Concededly, this Court has entertained jurisdiction in cases involving the validity of acts of a legislative character, which were not, strictly speaking, "statutes." Of this nature are cases involving the validity of City ordinances, regulations promulgated under legislative delegation of authority by various boards, bureaus and commissions, etc. However, we think a different situation is presented in this case.

Members of the police force of the City of St. Louis, Missouri, are "officers of the state," and have been declared such by the General Assembly of the state. Section 7711, R. S. Mo. 1939, reads as follows:

> "The members of the police force of the cities covered by this article, organized and appointed by the police commissioners of said cities, are hereby declared to be officers of the said cities, under the charter and ordinances thereof, and also to be officers of

> the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said cities."

In supervising the activities of the organization, the Board of Police Commissioners of the City of St. Louis has been authorized to adopt necessary rules and regulations for the government and discipline of the members thereof. It was pursuant to this delegation of legislative authority that the rule under attack was adopted.

In all of the cases in which this Court has entertained jurisdiction to review the validity of rules and regulations of various political agencies of the state, one characteristic has been present that is not found here. This distinguishing characteristic was the fact that all of such other rules and regulations had the effect of "law" in that they were applicable to the citizens of the state in general. They affected the public and were not restricted nor limited in their application to the internal management and organization of a state agency. The present rule, by its terms, relates only to the Government and discipline of the members of a particular organization, who are state officers, and to whom we believe the state has a right to attach such qualifications for continuance in their appointments or employments as the public policy of the state may require. For this reason, we do not think that the rule is a "statute of the state" within the meaning of the Federal jurisdictional statute.

The cases cited by appellants in their statement suggesting the jurisdiction of this Court follow the general rule in declaring that rules having the characteristics of legislation and sanctioned by the lawmaking body of the state are "statutes of the state." Probably the case most closely approximating the precise facts involved in the present matter is that of *Hamilton* v. *Regents of the University of California, et al.*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197.

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At first glance, this case apparently holds that the order of the Board of Regents of the University of California was considered to be a statute of that state. However, viewing the substance of the litigation there involved, and referring to the state report of the decision of the highest court of California, it becomes apparent that in reality a true "statute" and constitutional provision of the State of California was involved. For that reason, we believe the case distinguishable and not authority for the proposition that the rule here under attack is a statute of the State of Missouri.

Appeal Should Be Dismissed Because There is No Substantial Federal Question

An appeal to this court will be dismissed if no substantial federal question is raised by the appeal. *Manhattan Life Ins. Co. of New York* v. *Cohen*, 234 U. S. 123, 136, 137, 34 S. Ct. 874, 58 L. Ed. 1245; *Campbell* v. *Olney*, 262 U. S. 352, 354, 43 S. Ct. 559, 67 L. Ed. 1021; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455, 456, 44 S. Ct. 197, 68 L. Ed. 382; *Roe* v. *State of Kansas ex rel Smith*, 278 U. S. 191, 193, 49 S. Ct. 160, 73 L. Ed. 259.

As was held by Mr. Chief Justice White in *Equitable Life Insurance Society* v. *Brown*, 187 U. S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190: "The doctrine • • • is that although • • • it be found that a question adequate substractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy" the cause will be dismissed.

The facts as shown by the petition and the decision of the state court in this case involves the right of a Board of Police Commissioners of St. Louis, Missouri which is a

state agency to make a rule that members of the police department of the City of St. Louis, who are officers of the state, shall not belong to a police union.

This identical question has been before this court twice before on petitions for writs of certiorari and in both cases the petitions were denied. *Fraternal Order of Police* v. *Harris,* 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781; *City of Jackson* v. *McLeod,* 328 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368.

Furthermore, this court in the case of *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91 L. Ed. 509, 67 S. Ct. 556, held that an act of Congress, i.e. the Hatch Act which prohibited the federal employees from participating in political activities, was proper and reasonable. In the course of the opinion this court, speaking through Mr. Justice Reed, had this to say:

• • • • • • •

"Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolute. • • • Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."

• • • • • • •

"• • • For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. • • •

"• • • The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When

> actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

Further, this court in Ex parte Curtis, 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed. 232, upheld the right of Congress to enact a law which forbade employees, who are not appointed by the President and confirmed by the Senate, from giving or receiving money for political purposes from or to the employees of the Government.

Also in *United States* v. *Wurzbach*, 280 U. S. 396, 50 S. Ct. 167, 74 L. Ed. 508, a law prohibiting members of Congress from receiving contributions for any political purpose whatsoever from any other federal employee was sustained.

While the *Mitchell, Curtis* and *Wurzbach* cases are not identical with the facts here in question, the principles enunciated in these cases are authority for such lack of jurisdiction.

Other questions that this court will take into consideration in determining whether a real or substantial question is involved and not just a frivolous moot question or whether there was a division in the opinion of the lower court and whether the opinions of the state courts of last resort are in accord as to the particular question. As was said in *Louisville and Nashville Railroad* v. *Melton*, 218 U. S. 30, 54 L. Ed. 921, 30 S. Ct. 676, l.c. 927:

> "• • • We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the

> subject and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, * * *"

A reading of the opinion in the state court discloses that there was no division of the court as to the constitutional questions involved.

The courts of all the states in which this same question has been presented have uniformly held that a rule prohibiting membership of policemen in a police union was proper and reasonable and violated no constitutional rights of the police. *Fraternal Order of Firemen* v. *Harris,* 306 Mich. 68, 10 N. W. 2d 310; *City of Jackson* v. *McLeod,* Miss., 24 So. 2d 319; *Perez* v. *Board of Police Commissioners, City of Los Angeles,* 178 P. 2d 537; *Congress of Industrial Organ.* v. *City of Dallas,* 198 S. W. 2d 143.

A like rule as to other governmental employees has been sustained without exception by the highest courts of other states. *Seattle High School, Chapter No. 200* v. *Sharples,* 1930, 159 Wash. 424, 293 P. 994, 72 A. L. R. 1215; *Frederick* v. *Owens,* 1915, 35 Ohio Cir. Ct. R. 538; *Hutchinson* v. *Magee,* 1923, 278 Pa. 119, 122 A. 234; *Carter* v. *Thompson,* 1935, 164 Va. 312, 180 S. E. 410; *McAuliffe* v. *Mayor of City of New Bedford,* 155 Mass. 216, 29 N. E. 517; *Brownwell* v. *Russell,* 76 Vt. 326, 57 A. 103.

In the case of *Fraternal Order of Police* v. *Harris*, 306 Mich. 68, 10 N. W. (2d) 310, 312, certiorari denied, 321 U. S. 68, 88 L. Ed. 1076, 64 S. Ct. 781, the Court said:

> "Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender while acting in such capacity, some of their presumed private rights. As stated by Mr. Justice Sharpe: 'Nor can it be denied that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board.' "

In the case of *City of Jackson* v. *McLeod*, 199 Miss. 676, 24 So. (2d) 319, 321, certiorari denied, 328 U. S. 863, 90 L. Ed. 1633, 66 S. Ct. 1368, the Court said:

> "It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are liable to arise, which in turn may lead to disorders. • • • The police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, so far as their activities as policemen are concerned."

In the case of *McAuliffe* v. *Mayor, etc., of the City of New Bedford*, 155 Mass. 216, 29 N. E. 517, decided January 6, 1892, Justice Holmes in upholding a rule excluding police from political activity stated:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in

> which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

This statement of Justice Holmes was referred to in the recent case of *United Public Workers* v. *Mitchell, supra.* It is well to point out that restrictions upon the political activities of civil service employees of the city of St. Louis have been upheld, just as in its sphere, restrictions upon the political activities of Federal employees have been upheld. It is not a novel suggestion that when private citizens desire to enter the domain of public life, and hold public offices, whether appointive or elective, they forego some of the rights granted to them as private citizens under the Fourteenth Amendment of the Federal Constitution. 31 Am. Jur. 161; 41 Am. Jur. 937.

This Court has had before it in a previous case a like factual situation, *Hayman* v. *City of Galveston,* 273 U. S. 414, 71 L. Ed. 714, wherein the constitutionality of a regulation of the hospital board of the city of Galveston, Texas, was involved. This regulation provided that licensed osteopathic physicians could not practice in a city hospital. This Court, speaking through Mr. Justice Stone, said, l. c. 717:

> "• • • But the only protection claimed here is that of appellant's privilege to practice his calling. However extensive that protection may be in other situations, it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private prac-

tice of medicine. Compare Heim *v.* McCall, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287."

Again, in the case of *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497, this Court, through Mr. Justice Stone, said, l. c. 505:

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored. And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment. See Taylor & Marshall *v.* Beckham, 178 U. S. 548, 11 L. ed. 1187, 20 S. Ct. 890, 1009, supra, and authorities cited; Cave *v.* Missouri, 246 U. S. 650, 62 L. ed. 921, 38 S. Ct. 334, supra. Only once has it been contended here that an unlawful denial by state executive, administrative or legislative authority of the right to state office is for that reason alone a denial of equal protection. Wilson *v.* North Carolina, 169 U. S. 586, 42 L. Ed. 865, 18 S. Ct. 435. In rejecting that contention this Court said at pages 594, 595:
>
> " 'In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. . . .
>
> " 'Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.' "

It is settled that, upon application to this Court for review of a judgment of a State court, the burden is upon the petitioner to show affirmatively that this Court has jurisdiction. *Gorman* v. *Washington University*, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962; *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 852.

It is respondent's contention that under the previous decisions of this Court, as pointed out in the cases both Federal and State, that the Federal question sought to be injected in this case by appellants is without substance, and we respectfully submit that this Court should not take jurisdiction in this case.

J. E. Taylor,
Attorney General of the State of Missouri.